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No. _____

In The

Supreme Court of the United States

October Term, 1995

MARICOPA COUNTY,

Petitioner,

vs.

PATRICIA JUNOT,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *McKennon v. Nashville Banner Publishing Co.*, ___ U.S. ___, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995) bars introduction by a defendant employer of after-acquired evidence to rebut a plaintiff's prima facie showing that she was "otherwise qualified" for employment in an action brought pursuant to the Rehabilitation Act of 1973.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 7

REASONS FOR GRANTING THE PETITION 8

1. The legislative history and regulations promulgated under section 504 and its counterpart in the Americans with Disabilities Act of 1990 demonstrate that Congress clearly intended to protect employers from claims by unqualified employees 8

2. The rationale employed in the Ninth Circuit's opinion conflicts with the plain language of the Rehabilitation Act as interpreted by this Court and others 12

3. The lower court overlooked important differences between the elements of an Age Discrimination Act claim on the one hand and a Rehabilitation Act claim on the other 15

4. Accommodation of the Ninth Circuit's reasoning by employers will likely result in fewer handicapped hirings, not more 18

TABLE OF CONTENTS – Continued

Page

5. The Ninth Circuit's opinion proposes an unworkable trial process seriously impinging on petitioner's due process rights and threatening to compromise the fact-finders' search for truth in favor of an elusive public policy 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Choate, 469 U.S. 287 (1985).....9, 12

Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) 12

Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) 9

Cook v. U.S. Dept. of Labor, 688 F.2d 669 (9th Cir. 1983) 12

Dallas County v. Commercial Union Assurance Company, 286 F.2d 388 (5th Cir. 1961) 20

Doe by Lavery v. Attorney General of the United States, 44 F.3d 715 (9th Cir. 1995) 14

Doe v. New York University, 666 F.2d 761 (2nd Cir. 1981) 12

Junot v. Maricopa County, 67 F.3d 307 (9th Cir. 1995) 1

Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985)..... 6

McKennon v. Nashville Banner, ___ U.S. ___, 115 S.Ct. 879 (1995)..... *passim*

Plummer v. Branstad, 731 F.2d 574 (8th Cir. 1984) 12

Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981) 12

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)..... 14

Pushkin v. Regents of University of Colorado, 658 F.2d 1372 (10th Cir. 1981)..... 14

School Board of Nassau County v. Arline, 480 U.S. 273 (1987) 12

TABLE OF AUTHORITIES – Continued

Page

Simon v. Craft, 182 U.S. 427 (1901) 19

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 12, 13

Wallace v. Dunn Construction Co., Inc., 968 F.2d 1174 (11th Cir. 1992) 14

Wiseman v. Reposa, 463 F.2d 226 (1st Cir. 1972) ... 19, 20

STATUTES

28 U.S.C. Section 1254 1

Section 1331 2

29 U.S.C. Section 623 ..... 15, 16

Section 706 2

Section 791 2

Section 794 ..... 1, 2, 10

42 U.S.C. Section 2000(e)-2(a) 15

Section 12101 9

Section 12111 10

Section 12112 10

Section 12201 10

OTHER

45 C.F.R. § 84.3 (1991) 8

45 C.F.R. Pt. 84 App. A. (1991) 9

126 Cong. Rec. 526 (1972) 8

TABLE OF AUTHORITIES – Continued

Page

119 Cong. Rec. 6145 (1973) (Statement of Sen. Humphrey) 8

119 Cong. Rec. 7114 (1973) (Statement of Rep. Vanik) 8

Statement by President Bush upon signing S. 933, reprinted in 1990 U.S.C.C.A.N. 601 10

H.R. Rep. No. 101-485(II) 55, reprinted in 1990 U.S.C.C.A.N. 337 11

3 Devitt & Blackmar Federal Jury Practice and Instructions (1995 Supp.)

Section 104.03 15

Section 104A.03 13

Section 104A.04 13

Section 106.03 15

Wright & Graham, Federal Practice & Procedure: Evidence (1977) 21

OPINIONS BELOW

The memorandum opinion of the Ninth Circuit sought to be reviewed is *Junot v. Maricopa County*, No. 92-15712 (9th Cir. Oct. 2, 1995), reported as unpublished at 67 F.3d 307 (9th Cir. 1995). The district court's judgment by the same name, No. CIV-88-250-PHX-RCB is unreported. The judgment, the appellate court's opinion, and its order denying rehearing are reprinted in the accompanying Appendix.

JURISDICTION

Jurisdiction in this Court is afforded by 28 U.S.C. Section 1254(1). The memorandum opinion sought to be reviewed was entered by the Ninth Circuit on October 2, 1995; petitioner's timely request to the Ninth Circuit for rehearing was denied on November 17, 1995.

STATUTE INVOLVED

This case concerns the following portion of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794(a):[1]

[1] As amended through 1988. The current version of this statute reads in pertinent part: "No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

and the pertinent provisions of 29 U.S.C. Section 706(8), defining "individual with handicaps," as any person who:

> (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded [by a potential employer] as having such an impairment.

STATEMENT OF THE CASE

1. INTRODUCTION

This is an employment discrimination case brought under the Rehabilitation Act of 1973.[2] Jurisdiction in the district court was based on 28 U.S.C. Section 1331. Following five weeks of trial, the jury returned a verdict for defendant employer on January 15, 1992; plaintiff appealed. The appeal was argued and submitted in October, 1994. In December, 1994, the Ninth Circuit vacated the submission of the case pending the outcome of this

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One addition to section 504 now makes clear that claims under the Rehabilitation Act of 1973 are to be determined using the same standards that apply to claims made under the Americans with Disabilities Act of 1990, *see* 29 U.S.C. section 794(d) (Cum. Supp. 1995).

[2] 29 U.S.C. § 791 et seq.

Court's decision in *McKennon v. Nashville Banner Publishing Co.*[3] In February, 1995, the court of appeals ordered the parties to file simultaneous memoranda addressing the applicability of the *McKennon* decision. In October, 1995, the panel issued a memorandum opinion ordering a new trial in light of *McKennon*.[4] The opinion specified that the trial is to be bifurcated, and defendant is to be barred from introducing any evidence acquired after it refused to hire plaintiff relating to her physical and mental inability to perform the functions of the job, until after the jury has passed on the liability phase of the case.

2. FACTUAL BACKGROUND

In 1985, Patricia Junot ("Junot") applied to the Maricopa County Sheriff's Office ("County") for the position of detention officer, a job which involved supervising and controlling inmates housed in the local county jail system. Junot withheld pertinent information from her application, supplied false information and obstructed the County from discovering and reviewing pertinent medical and psychiatric records.

In 1984 Ms. Junot had a radical mastectomy; that same year she filed for divorce. The greater part of the information concerning Junot's physical condition was disclosed in the public records of her divorce. After her

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[3] ___ U.S. ___, 115 S.Ct. 879 (1995).

[4] The panel's memorandum concluded with "we reverse the grant of summary judgment" even though the panel had acknowledged at the beginning of its memorandum that the matter came to the court following a jury verdict.

application to the County was denied in 1985, she repeatedly filed sworn affidavits seeking spousal maintenance based upon her claim that her 1984 cancer surgery rendered her unable to work because she was unable to use her right arm. Yet during the physical exam which Junot underwent as part of her job application in January, 1985, Junot withheld that her cancer surgery adversely affected her right arm, making her unable to perform simple physical tasks, let alone to apply physical force to subdue inmates or rescue fellow officers in a jail, to carry inmates out of a cell in a fire or other similar dangerous situations, to carry food, supplies and other materials within the jail, and the like. Had she disclosed this information, she would have been given a stress test, which would have revealed the extent of the weakness in her arm. After executing a medical waiver for the County, Junot telephoned her cancer surgeon's office and instructed that no information should be provided to anyone making inquiry of her medical history.

She failed to disclose that she had been admitted to a mental hospital five months before her date of application specifically because she attempted suicide. In both her job application and her physical exam, she identified the hospital and the year she was admitted, without explaining why she was there. On her application she specifically denied ever having attempted suicide, although she admitted having been treated by a psychiatrist or psychologist. Junot also failed to disclose that, while she was being treated at that hospital, she had admitted to being suicidal for over three years theretofore.

Junot further failed to reveal in either her application or at her physical examination that she had a long history

of migraine headaches which interfered with her ability to appear at work regularly. Following her application to the County, Junot declared to other employers that she suffered from a lengthy history of debilitating migraine headaches in order to justify her work absences.

The information withheld by Junot was gathered through discovery including the fact that Junot had misrepresented the length and depth of previous job experience in her application.

In 1985, the Maricopa County Sheriff's Office had a long-standing employment policy which required job applicants to undergo a pre-placement physical evaluation to determine the applicant's medical qualification for employment. Then-existing policy guidelines assigned different levels of risk, on a scale of zero to four, to different types of medical disorders. Cancerous tumors removed within the last ten years had a potential risk factor of one (minor) to three (major), similar factors were assigned to, inter alia, chronic bronchitis, gastric ulcer and glaucoma. Applicants for the position of sheriff deputy or detention officer were required to have a zero risk factor. The County ceased processing Junot's application following the examining physician's report that she had a risk factor of "1."[5]

In a pre-trial ruling, the district court directed the County not to claim that it did not hire nor would not have hired Junot based on any after-acquired evidence. However, the court allowed the evidence in as relevant to

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[5] This risk factor was assigned due to her recent mastectomy.

Junot's fitness to serve as a detention officer and her credibility. It was also allowed to rebut her claim that had she been hired, she would have enjoyed a 20-year career with the County and would have retired with the rank of Captain.

In her appeal, Junot argued that the trial court improperly instructed the jury under pre-existing Ninth Circuit law set forth in another Rehabilitation Act case, *Mantolete v. Bolger*:[6]

> The asserted basis for the decision by defendant not to hire plaintiff must be limited to the information relied on at the time the decision was made. However, defendant may rely on information unknown at the time but learned later to show that plaintiff was not "otherwise qualified" for the job. You have heard evidence of plaintiff's physical, emotional and psychological condition which defendant obtained or learned after its decision not to hire her. That evidence may be considered by you to determine whether plaintiff was qualified for the position she sought and whether she has established her claim for damages. You may not consider it as an after-the-fact effort by the defendant to show a non-discriminatory purpose for its decision.

The Ninth Circuit panel who heard Junot's appeal determined that this Court's recent decision in *McKennon v. Nashville Banner Publishing Co., supra,* mandated a new trial because the after-acquired evidence doctrine barred use of the above-mentioned information until after the jury determined, in a bifurcated proceeding, that the

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[6] 767 F.2d 1416 (9th Cir. 1985).

County was in fact liable for failing to hire Junot due to her disability. The import of the decision is that the County cannot use any after-acquired evidence to rebut Junot's claim that she was "otherwise qualified" for the job nor her credibility.

SUMMARY OF THE ARGUMENT

Neither section 504, its legislative history, pertinent case law, nor the *McKennon* decision itself supports the Ninth Circuit's opinion. The statute clearly requires that a plaintiff bears the burden of making a *prima facie* showing that he or she was "otherwise qualified" for the position in question before the burden of proof shifts to the employer. To bar evidence of plaintiff's lack of qualification simply because it was discovered after the adverse employment decision was made operates as a judicially-created conclusive presumption that alters the substantive law.

McKennon is distinguishable from the instant case because it dealt with ADEA legislation which, on its face, recognizes no exception to the prohibition against age discrimination. Whereas the Rehabilitation Act of 1973 only protects those disabled individuals who are "qualified" for the position in question.

The Ninth Circuit's decision gives the disabled and unqualified job applicant an advantage over non-disabled unqualified applicants, which may operate to discourage employers from hiring the disabled.

The drastic remedy of a bifurcated trial is unwarranted and violates the burden of proof set out not only in the plain language of the statute but also in its legislative origins, existing precedent and common sense.

REASONS FOR GRANTING THE PETITION

1. THE LEGISLATIVE HISTORY AND REGULATIONS PROMULGATED UNDER SECTION 504 AND ITS COUNTERPART IN THE AMERICANS WITH DISABILITIES ACT OF 1990 DEMONSTRATE THAT CONGRESS CLEARLY INTENDED TO PROTECT EMPLOYERS FROM CLAIMS BY UNQUALIFIED EMPLOYEES.

A. The Rehabilitation Act of 1973:

The requirement that a complaining party be "qualified" for the job has been a component of section 504 since it was first introduced.[7]

The regulations promulgated under the Rehabilitation Act clarify that the term "Qualified handicapped person" means:

> With respect to employment, a handicapped person who, with reasonable accommodation, **can perform the essential functions of the job** in question;

45 C.F.R. Section 84.3 (1991) (emphasis added). The "Analysis of Final Regulations" further elucidates:

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[7] See, 126 Cong. Rec. 526 (1972); 119 Cong. Rec. 6145 (1973) (Statement of Sen. Humphrey); 119 Cong. Rec. 7114 (1973) (Statement of Rep. Vanik).

> Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order **to comport with the intent of the statute** because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. **Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress**. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

45 C.F.R. Pt. 84 App. A.(5) (1991) (emphasis added).[8]

B. The Americans with Disabilities Act of 1990:

The Rehabilitation Act was followed by the Americans with Disabilities Act of 1990[9] ("the ADA"). Whereas

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[8] The 1991 version of these regulations is cited because that is the version that was in effect when the jury returned its verdict in January, 1992. They have not changed substantively in the interim. "We have previously recognized that the regulations promulgated by HHS pursuant to the Act provide an important source of guidance on the meaning of § 504." *Alexander v. Choate*, 469 U.S. 287, 304 n.24, 105 S.Ct. 712, 722 n.24 (1985), citing *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 & n.15, 104 S.Ct. 1248, 1254 & n.15 (1984) (the regulations to § 504 "particularly merit deference" as Congress approved their final form and incorporated them into the 1978 amendments to the Act).

[9] 42 U.S.C. sections 12101 et seq.

the Rehabilitation Act applies only to federal agencies, federal contractors and employers receiving federal financial assistance (29 U.S.C. Section 794), the ADA prohibits employment discrimination by "any person engaged in an industry affecting commerce who has 15 or more employees" (42 U.S.C. § 12111).

The ADA explicitly adopted much of the pertinent provisions of the Rehabilitation Act, particularly those guidelines and definitions that concern employment discrimination.[10] The language of the ADA is instructive in understanding the limitations on the rights offered under both the Acts. Section 12112 bars employment discrimination "against a qualified individual with a disability because of the disability." Section 12111(8) defines "qualified individual with a disability" as "an individual with a

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[10] *See, e.g.*, 42 U.S.C. Section 12201, "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." "The Administration worked closely with the Congress to ensure that, wherever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA. The Rehabilitation Act standards are already familiar to large segments of the private sector that are either Federal contractors or recipients of Federal funds. Because the Rehabilitation Act was enacted 17 years ago, there is already an extensive body of law interpreting the requirements of that Act. Employers can turn to these interpretations for guidance on how to meet their obligations under the ADA." Statement by President George Bush upon signing S. 933 (July 26, 1990), reprinted in 1990 U.S.C.C.A.N. 601.

disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The legislative history of the ADA explains:

> This definition is comparable to the definition used in regulations implementing section 501 and section 504 of the Rehabilitation Act of 1973. The phrase "essential functions" means job tasks that are fundamental and not marginal. The point of including this phrase within the definition of a "qualified individual with a disability" is **to ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform** the essential, i.e., the non-marginal functions of the job in question.
>
> * * *
>
> The basic concept is that **an employer may require that every employee be qualified** to perform the essential functions of a job. . . .
>
> By including the phrase "qualified individual with a disability," the Committee intends to reaffirm that **this legislation does not undermine an employer's ability to choose and maintain qualified workers.** This legislation simply provides that employment decisions must not have the purpose or effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.

House Rep. No. 101-485(II) 55, reprinted in 1990 U.S.C.C.A.N. 337 (emphasis added).

> As in Section 504, the ADA adopts a framework for employment selection procedures

> which is designed to assure that persons with disabilities are not excluded from job opportunities **unless they are actually unable to do the job.**

Id. at 71, reprinted in 1990 U.S.C.C.A.N. 353.

2. THE RATIONALE EMPLOYED IN THE NINTH CIRCUIT'S OPINION CONFLICTS WITH THE PLAIN LANGUAGE OF THE REHABILITATION ACT AS INTERPRETED BY THIS COURT AND OTHERS.

Section 504 requires a *prima facie* showing that plaintiff was "**otherwise qualified**" for the job, "before the nondiscrimination principle of section 504 becomes relevant."[11] The necessity of such a showing was underscored in *School Board of Nassau County v. Arline*:[12]

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[11] *Alexander v. Choate*, 469 U.S. 287, 299 n.19, 105 S.Ct. 712, 719 n.19 (1985), citing *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979).

[12] 480 U.S. 273, 287, 107 S.Ct. 1123, 1130-31 (1987). *See also, Bowen v. American Hosp. Ass'n.*, 476 U.S. 610, 624, 106 S.Ct. 2101, 2110-11 (1986); *Southeastern Community College v. Davis*, 442 U.S. 397, 403-407, 99 S.Ct. 2361, 2365-2367 (1979); *Plummer v. Branstad*, 731 F.2d 574, 577 (8th Cir. 1984); *Cook v. U.S. Dept. of Labor*, 688 F.2d 669, 670 (9th Cir. 1983); *Doe v. New York University*, 666 F.2d 761, 774-75 (2nd Cir. 1981); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 306 (5th Cir. 1981). The elements of an Americans with Disabilities Act claim include a showing that plaintiff was a "qualified person with a disability, as that term is defined in these instructions," "the term 'qualified individuals with a disability', as used in these instructions, means an individual with a disability who can perform the essential functions of the employment position . . . for which the plaintiff has

> Such an inquiry is essential if §504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

This Court interpreted the Rehabilitation Act for the first time in *Southeastern Community College v. Davis*,[13] in which the Court held that an "otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[14] The Court upheld the district court's finding that the plaintiff, who suffered from a serious hearing disability, was not a member of the class of persons whom the statute was intended to protect because she could not meet the reasonable physical requirements of the clinical nursing program to which she had been denied admission. Since plaintiff could not show she was "otherwise qualified," defendant's rejection of her was not discriminatory within the meaning of the Act.[15]

Courts have uniformly required that a Rehabilitation Act claimant show that he or she was "otherwise qualified" for the job.

> *First*, the individual is required to show that he is otherwise qualified for the position sought;

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applied." 3 Devitt & Blackmar Federal Jury Practice and Instructions §§ 104A.03 & 104A.04 (1995 Supp.).

[13] 442 U.S. 397, 99 S.Ct. 2361 (1979).

[14] *Id.* at 406, 99 S.Ct. at 2367 (1979).

[15] *Id.* at 407-414, 99 S.Ct. at 2367-2371.

> *second*, the individual must show that even though he is otherwise qualified, he was rejected for the position solely on the basis of his handicap. The two factors are interrelated, since if the individual is not otherwise qualified he cannot be said to have been rejected solely because of his handicap.[16]

This interpretation of the statute is based on its plain language.

Absent such proof, a plaintiff would lack sufficient standing to proceed.[17] The court has effectively rewritten the requirements of Section 504 where the employer has failed to discover, as of the time that a hiring decision has been made, that the applicant lacks the necessary qualifications required to perform the job.[18]

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[16] *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372, 1385 (10th Cir. 1981) (emphasis in the original), cited in *Doe by Lavery v. Attorney General of the United States*, 44 F.3d 715, 718-19 (9th Cir. 1995).

[17] *See Wallace v. Dunn Construction Co., Inc.*, 968 F.2d 1174, 1185-1189 (1992) (Godbold, J., dissenting) (distinguishing application fraud from misconduct on the job and suggesting that under the former plaintiff lacks standing to file suit), vacated 32 F.3d 1489, opinion after rehearing, 62 F.3d 374 (1995).

[18] Under the Ninth Circuit's reasoning, an employer who, in fact, discovers an applicant's lack of qualifications to perform the work before he arrives at his hiring decision is not at risk since such a discovery, at worst, would provide the employer with a "mixed motivation" when making the hiring decision which could be used to defeat a plaintiff's case through a dispositive motion. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989). Should an employer make such a discovery *after the fact, however, he would be precluded from obtaining such a result.*

3. THE LOWER COURT OVERLOOKED IMPORTANT DIFFERENCES BETWEEN THE ELEMENTS OF AN AGE DISCRIMINATION ACT CLAIM ON THE ONE HAND AND A REHABILITATION ACT CLAIM ON THE OTHER.

The *McKennon* opinion focuses on the Age Discrimination in Employment Act ("ADEA").[19] This statute protects a plaintiff who can show that he or she was damaged by an adverse employment action taken by the defendant, and that age was a motivating factor in the defendant's decision to take the adverse action.[20] The burden then shifts to defendant to prove otherwise. As Mrs. McKennon argued before this Court, "proof of qualification is not a necessary element of a prima facie case" under Title VII or the ADEA.[21]

The pertinent provision of Title VII, section 703(a) of the Civil Rights Act of 1964[22] provides:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

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[19] 29 U.S.C. § 623 et seq.

[20] *See* 3 Devitt & Blackmar, Federal Jury Practice and Instructions § 106.03 (1995 Supp.), *see also id.* at § 104.03 (Title VII).

[21] Petitioner's Reply Brief at 8.

[22] 42 U.S.C. § 2000(e)-2(a).

The counterpart to this provision in the Age Discrimination in Employment Act[23] reads:

> It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Neither Title VII nor the ADEA provision indicates that a plaintiff needs to show qualification for the job as part of his or her *prima facie* case.

Furthermore, the well-established remedial principles applicable to employment discrimination claims aim at restoring the plaintiff to the position she would have occupied but for the discrimination. In the case of an unqualified applicant, the status quo is not disturbed by upholding the employer's decision to not hire her.

McKennon dealt with a split in the circuits concerning after-acquired evidence that was being used by employers to create a mixed motive defense to their own discriminatory employment practices. None of the cases cited by the Court involved a claim brought under the Rehabilitation Act.[24] Nor did any of these cases require

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[23] 29 U.S.C. § 623(a).

[24] The *McKennon* decision cited the following cases as representing the split in the circuit courts which the Supreme Court wished to resolve: "Compare *Welch v. Liberty Machine Works, Inc.*, 23 F.3d 1403 (CA8 1994) [ERISA and Missouri Human Rights Act]; *O'Driscoll v. Hercules, Inc.*, 12 F.3d 176 (CA10 1994) [ADEA, Title VII & Fair Labor Standards Act]; [*McKennon v. Nashville Banner Pub. Co.*,] 9 F.3d 539 (CA6 1993)

the plaintiff to prove his or her qualification for the position sought before the burden of proof shifted to the employer. This is a distinction with a tremendous difference. *McKennon* simply did not address itself to the issue in the instant case, i.e., whether after-acquired evidence that plaintiff was not "otherwise qualified" is admissible to rebut plaintiff's *prima facie* case.

The ADEA broadly prohibits employment discrimination on the basis of age against any individual, and does not provide for any exceptions. By contrast, the Rehabilitation Act specifically permits discrimination against any disabled individual who is not "otherwise qualified," in the sense that it excludes such individuals from the statute's protection. Put another way, the Act does not protect individuals who are disabled but unqualified anymore than it protects individuals who are not disabled. This extra element of the plaintiff's claim mandates that employers be allowed to present after-acquired evidence insofar as it demonstrates plaintiff is not qualified for the position. Otherwise, plaintiff is judicially relieved of the burden of proof mandated by statute. The Ninth Circuit's reasoning in the instant case

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[ADEA]; *Washington v. Lake County*, 969 F.2d 250 (CA7 1992) [Title VII, 42 U.S.C. §§ 1981 & 1983]; *Johnson v. Honeywell Information Systems, Inc.*, 955 F.2d 409 (CA6 1992) [Mich. Civil Rights Statute]; *Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700 (CA10 1988) [ADEA & Title VII]; *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614 (CA4 1984) . . . [ADEA], with *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221 (CA3 1994) [Title VII]; *Kristufek v. Hussman Foodservice Co., Toastmaster Division*, 985 F.2d 364 (CA7 1993) [ADEA]; *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (CA11 1992) . . . [Equal Pay Act & Title VII]." *McKennon*, ___ U.S. ___, 115 S.Ct. 879, 883.

improperly rewrites the plain language of the statute in derogation of congressional intent.

Additionally, the after-acquired evidence in *McKennon* concerned a tangential issue unrelated to any element of Mrs. McKennon's ADEA claim.[25] In the instant case, the after-acquired evidence relates *directly* to an element of the Rehabilitation Act.

4. ACCOMMODATION OF THE NINTH CIRCUIT'S REASONING BY EMPLOYERS WILL LIKELY RESULT IN FEWER HANDICAPPED HIRINGS, NOT MORE.

Recognizing that Congress intended to promote fair employment practices by encouraging employers to hire the disabled, the lower court's ruling, paradoxically, would lead to the opposite result. To avoid liability the employer would be required to discover everything possible about an applicant's abilities *in advance* of making any hiring decision. Employers would be inclined to approach disabled applicants with greater caution or suspicion and spend greater sums of money conducting more thorough investigations of such applicants' qualifications as a self-protective measure.

Conversely, disingenuous disabled applicants, like Junot, would be rewarded by successfully concealing their lack of qualifications and would be inclined to ignore admonitions appearing on the face of employment

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[25] Mrs. McKennon had illegally removed photocopies of confidential documents bearing upon her employer's financial condition. ___ U.S. at ___, 115 S.Ct. at 883.

applications (as appeared in the instant case) warning the applicants of the consequences of making false or misleading entries thereon. Under such circumstances, the untruthful or deceptive applicant could look forward to receiving a windfall through litigation. There is no indication that Congress enacted the Rehabilitation Act with the intent to reward concealment and deceit.

5. THE NINTH CIRCUIT'S OPINION PROPOSES AN UNWORKABLE TRIAL PROCESS SERIOUSLY IMPINGING ON PETITIONER'S DUE PROCESS RIGHTS AND THREATENING TO COMPROMISE THE FACT FINDERS' SEARCH FOR TRUTH IN FAVOR OF AN ELUSIVE PUBLIC POLICY.

By applying *McKennon* in the manner that it has to this case, the appellate court has created the further effect of compromising trials as they are recognized in the Anglo-American adversary system of law, insofar as it has precluded the County from conducting full and fair cross-examination of Junot during the liability trial.

Due Process necessitates a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it.[26] A significant, if not fundamental, part of that "opportunity" is found in cross-examination. In *Wiseman v. Reposa*,[27] a seaman sued a shipowner for personal injuries. The shipowner was

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[26] *Simon v. Craft*, 182 U.S. 427, 437, 21 S.Ct. 836, 840 (1901).

[27] 463 F.2d 226 (1st Cir. 1972).

precluded from cross-examining the plaintiff about bribing a witness to testify in plaintiff's favor. In reviewing the effect of such a denial, the court stated:[28]

> Nothing is more important in a trial of this character than cross-examination of the parties, particularly with respect to credibility. At the outset of the case defendant sought unsuccessfully, however, to cross-examine the plaintiff as to whether he has attempted to bribe a witness. The court excluded the question. **It would be difficult to think of a more substantial error.** McCormick, *Evidence* § 22, pp. 45-46; 3 Wigmore, *Evidence* § 960. **Such cross-examination, within limits, is a matter of right.** *Alford v. United States*, 262 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931).

Similarly, in *Dallas County v. Commercial Union Assurance Company*,[29] the court held that "in the Anglo-American adversary system of law, courts usually will not admit evidence unless its accuracy and trustworthiness may be tested by cross-examination."

The holding in the instant case permits Junot to present herself to the trier of fact with impunity as a person who was "otherwise qualified" to work as a detention officer. The County ordinarily would be permitted to cross-examine Junot on such an element, particularly since it is the linchpin of a section 504 cause of action. Instead the County will have to stand mute in the face of

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[28] *Id.* at 227.

[29] 286 F.2d 388, 391 (5th Cir. 1961).

the judicially-created conclusive presumption[30] of Junot's qualifications for the job.

This procedure, so offensive to notions of due process, is especially troubling in light of the fact that the County does not merely have *some* evidence that could be used to confront Junot during cross-examination on this point, the County has *overwhelming* evidence, i.e., Junot's sworn testimony in her divorce trial that she was unable to work because of an unusable right arm; Junot's four sworn divorce court petitions[31] for orders to show cause wherein she consistently claimed to be unable to work, *inter alia*, because of her right arm; psychiatric hospital records relating to Junot's attempted suicide and her statements to the nursing staff during her stay there; and her medical records relating to her many absences from work due to a long history of debilitating migraine headaches. In other words, not only could the County *rebut* Junot's claim that she was "otherwise qualified," the County could also *impeach* Junot through cross-examination. The Ninth Circuit's decision, however, has denied the County that opportunity.

In its effort to apply the curative measure announced in *McKennon* to the instant case which, no doubt, the

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[30] This kind of presumption is actually a fiction by which the substantive law is altered in practice though it remains unchanged in terms. Wright & Graham, Federal Practice & Procedure: Evidence § 5122 (1977).

[31] The last of these petitions was filed by Junot in Maricopa County Superior Court ten months *after* she initiated the instant action, wherein she continued to claim that she was unable to work due to an incapacitated right arm caused by surgery which predated her employment application with the County.

appellate court perceived to be an evil (the County's failure to hire Junot), the Ninth Circuit has created a different and greater evil – multifaceted in effect and, through its operation, standing outside of that spirit of even-handed fairness which the American system of justice is presumed to embody.

CONCLUSION

The important federal question presented here requires that this Court grant the requested writ to avoid misapplication of its recent decision in *McKennon* and to preserve the burdens of proof imposed by statute.

WHEREFORE, petitioner requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

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APPENDIX A

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA JUNOT, Plaintiff-Appellant, v. MARICOPA COUNTY, Defendant-Appellee.	No. 92-15712 DC No. CV-88-00250-RCB MEMORANDUM* (Filed Oct. 2, 1995)

Appeal from the United States District Court
For the District of Arizona
Robert C. Broomfield, District Judge, Presiding
Argued and Submitted October 7, 1994
Submission Vacated December 27, 1994
Resubmitted September 26, 1995
San Francisco, California

Before: SCHROEDER, FERGUSON, and RYMER, Circuit Judges.

Patricia Junot appeals from the district court's judgment, following a jury trial, in favor of Maricopa County ("County"), and the court's denial of her post-trial motion for a new trial. Junot's action alleged that the County discriminated against her, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794, when it rejected her application for employment as a detention

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

officer cadet in the Maricopa County Sheriff's Department because she had suffered from cancer. The Rehabilitation Act, in material part, establishes liability on the part of an employer receiving federal funds when it discriminates against an "otherwise qualified individual with a disability in the United States . . . solely by reason of her or his handicap. . . . " 29 U.S.C. § 794(a).[1]

The evidence at trial established that Junot's recent mastectomy played at least a material role in the county's refusal to hire her. The issue on appeal concerns the admission of evidence relating to whether Junot was "otherwise qualified." Junot challenges the district court's admission of evidence of information the County learned after it rejected her. She argues the evidence is not relevant to whether she was "otherwise qualified" for the job.

Junot argues that, as a matter of law, the district court should not have admitted any evidence of after-acquired information regarding her qualifications. She bases her argument on this court's leading decision on after-acquired evidence in a Rehabilitation Act case, *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985). In *Mantolete*, however, we held that after-acquired information *was* relevant

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[1] A person is an "individual with a disability" under § 706(8) (B) where the person:

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment; or,

(iii) is regarded [by a potential employer] as having such an impairment.

Rehabilitation Act of 1973, 29 U.S.C. § 706(8) (B).

to show that the applicant was not otherwise qualified. *Id.* at 1424. In the case at bar, the district court gave the following instruction to the jury on the use of after-acquired evidence:

> The asserted basis for the decision by defendant not to hire plaintiff must be limited to the information relied on at the time the decision was made. However, defendant may rely on information unknown at the time but learned later to show that plaintiff was not "otherwise qualified" for the job. You have heard evidence of plaintiff's physical, emotional and psychological condition which defendant obtained or learned after its decision not to hire her. That evidence may be considered by you to determine whether plaintiff was qualified for the position she sought and whether she has established her claim for damages. You may not consider it as an after-the-fact effort by the defendant to show a non-discriminatory purpose for its decision.

The instruction may have been correct pursuant to *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985). Recent Supreme Court authority, however, instructs otherwise.

In *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995), the Supreme Court considered whether an employee discharged in violation of the Age Discrimination in Employment At [sic] of 1967 ("ADEA") is barred from relief when the employer discovers post-discharge evidence of wrongdoing that would have led to termination on lawful and legitimate grounds. The Court determined that the deterrence and compensation objectives of the ADEA would not be vindicated "if after-acquired evidence of wrongdoing that would have

resulted in termination operates, in every instance, to bar all relief for an earlier violation." *Id.*, 115 S. Ct. at 884.

We conclude that such objectives obtain in the Rehabilitation Act context, and those objectives would be thwarted if after-acquired evidence could be introduced at the liability phase. The Court expressly ruled that the ADEA is part of a wider statutory scheme to protect employees in the workplace. That scheme, the court noted, included "Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1988 ed. and Supp. V) (race, color, sex, national origin, and religion); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (1988 ed., Supp. V) (disability); the National Labor Relations Act, 29 U.S.C. § 158(a) (union activities); the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (sex)." *Id.*, 115 S. Ct. at 884. The Rehabilitation Act is also part of the scheme, and use of after-acquired evidence during the liability phase of the trial would flout the broad congressional objective of eradicating workplace discrimination.

In the event that Junot prevails on retrial in the liability phase, however, at least some of the after-acquired evidence may be introduced by the employer during the damages phase of the trial. *See McKennon*, 115 S. Ct. at 885-86. The County argues that had it known of alleged misstatements and omissions it would not have considered Junot qualified for employment. The County may, pursuant to *McKennon*, introduce evidence of any falsification in Junot's application for employment. The district court should consider whether the county may also introduce after acquired evidence of Junot's physical condition, including migraine headaches and arm weakness. Finally, we note that *McKennon* stated that a district

court, in determining "[t]he proper boundaries of relief," may take into consideration "extraordinary equitable circumstances." *Id.* at 886. Thus, the district court should not feel otherwise constrained by this opinion in its consideration of equitable factors bearing on damages.

For these reasons, we reverse the grant of summary judgment and remand the case to the district court for a bifurcated retrial in light of the Supreme Court's unanimous opinion in *McKennon*.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JUNOT

Plaintiff

V.

MARICOPA COUNTY,

Defendants

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CIV-88-250-PHX-RCB

XXX **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT THE JURY FIND IN FAVOR OF THE DEFENDANT:

PLAINTIFF TAKE NOTHING, THIS COMPLAINT AND ACTION ARE HEREBYS [sic] DISMISSED.

January 22,1992
Date

RICHARD H. WEARE
Clerk

/s/ Illegible
(By) Deputy Clerk

APPENDIX C

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA JUNOT, Plaintiff-Appellee, v. MARICOPA COUNTY, Defendant-Appellant.	No. 92-15712 DC No. CV-88-00250-RCB ORDER (Filed Nov. 17, 1995)

Before: SCHROEDER, FERGUSON, and RYMER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

(2)

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

95-1178

No._____

In The
Supreme Court of the United States
October Term, 1995

MARICOPA COUNTY,

Petitioner,

vs.

PATRICIA JUNOT,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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13 pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
1. The Ninth Circuit Fully Considered and Correctly Decided the Issue Presented	3
2. This Court, Just One Year Ago, Unanimously Adopted the Rationale Set Forth in the Ninth Circuit's Decision	6
3. The Issue Presented In this Case is not Important Enough to Warrant Review	7
CONCLUSION	8

TABLE OF AUTHORITIES

Page

Cases

McKennon v. Nashville Banner Publishing, ___ U.S. ___, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995) 3-7

Junot v. Maricopa County, 67 F.3d 307, No. 92-15712 (9th Cir. 1995) 1, 3, 5, 7

Statutes

29 U.S.C. §623 et seq. 4

29 U.S.C. §791 et seq. 4

42 U.S.C. §12101 et seq. 5

The Respondent, Patricia Junot, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. The Ninth Circuit found the opinion not appropriate for publication; consequently, it is reported as unpublished at 67 F.3d 307 (9th Cir. 1995). A copy is attached to the petition and is not duplicated here. The District Court's Judgment, No. CIV-88-250-PHX-RCB is unreported.

STATEMENT OF THE CASE

Contrary to the factual assertions set forth at pp. 2-7 of the Petition for Certiorari, this case does not present a factual situation where an employee "withheld pertinent information from her application, supplied false information and obstructed the county from discovering and reviewing pertinent medical and psychiatric records." (Petition, p. 3). Rather, it involves a situation where an employee who had recently undergone a radical mastectomy, went through a bitter divorce and during that time period applied for a job with Maricopa County to serve as a Detention Officer. She applied for the position in 1985 at a time when the County was rapidly expanding its need for such employees as it was preparing to open a new jail facility. She truthfully stated on her application that she had been admitted to a hospital known throughout the County for psychiatric treatment and that she had recently undergone a radical mastectomy. She also advised County officials during the course of interviews that she was going through a divorce. She was put through a rigorous psychiatric evaluation by an employee of the

County and she passed with flying colors. In the course of that psychological evaluation, a call was made to her treating psychiatrist at Camelback Hospital who provided the County with additional information concerning her psychiatric condition. She was given an acceptable rating, a rating that was deemed acceptable by virtue of the fact that a number of applicants with a similar rating were hired.

In addition to the psychological evaluation, Ms. Junot was subjected to an interview, which she passed, and her background was thoroughly checked by Sheriff's Department employees. She successfully went through that process as well.

The last step in the hiring process is to have the applicant submit to a medical examination by a county-appointed physician. It was then that she was rejected. Junot was rejected pursuant to a county policy, in writing, which ranks anyone who had suffered from cancer within five years prior to applying for any position, on a pre-determined scale of 1-5. The Sheriff's Department then had a policy, in writing, which precluded anyone who was ranked 1 or higher on the medical evaluation from being hired as a Detention Officer. Accordingly, Junot's application was doomed, and that was what was stated as the reason for her rejection on a personnel department form.

Not until long after this lawsuit was filed, just prior to the close of discovery, when current counsel was retained by the County to take over the case from the previous attorney handling it, was an investigation commenced which led to later-made claims that Junot was not otherwise qualified for the

position. It was thereafter that the County created the issues of a weak arm, falsifaction of an employment application, withholding of information, etc. Accordingly, Respondent here attempted through appropriate motions in limine to preclude the introduction of that evidence or, in the alternative, to bifurcate the trial into a liability phase and damages phase with the latter-discovered evidence usable only during the damages phase. The District Court refused to do so and that is what led to the reversal by the Court of Appeals based upon this Court's similar holding in McKennon, infra.

REASONS FOR DENYING THE WRIT

1. The Ninth Circuit Fully Considered and Correctly Decided the Question Presented.

The sole question presented in the petition (p. i) is

> [w]hether this Court's decision in McKennon v. Nashville Banner Publishing, ___ U.S. ___, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995) bars introduction by a defendant employer of after-acquired evidence to rebut a plaintiff's prima facie showing that she was 'otherwise qualified' for employment in an action brought pursuant to the Rehabilitation Act of 1973.

A brief synopsis of the Ninth Circuit's decision in Junot v. Maricopa County, No. 92-15712 (Oct. 2, 1995) and this Court's unanimous 1995 decision in McKennon, 115 S.Ct. 879, clearly shows that the Ninth Circuit both fully considered and correctly decided the question presented by the instant writ.

In its opinion (p. 4), the Ninth Circuit found that the "use of after-acquired evidence during the liability phase of the

trial would flout the broad congressional objective of eradicating workplace discrimination." And although Junot concerns the Rehabilitation Act of 1973, 29 U.S.C. §791 et seq. (herein, "Rehabilitation Act"), as opposed to the Age Discrimination in Employment Act, 29 U.S.C. §623 et seq. (herein, "ADEA"), the Ninth Circuit found that this Court's unanimous decision in McKennon was controlling. However, the Petitioner in its petition (p. 7) now claims that McKennon, an ADEA case, is so "distinguishable from the instant case" that its rationale should not be controlling in the instant matter. Such a contention is clearly erroneous.

In McKennon, 115 S.Ct. at 884, this Court pronounced

> The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but a part wider statutory scheme to protect employees in the work place nationwide. See[1] Title VII of the

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[1] (footnote added). It appears obvious to the Respondent (and the Ninth Circuit's Junot decision leads us to believe that they would agree) that this Court's listing of these statutes is illustrative, rather than exhaustive. To this end, The Bluebook: A Uniform System of Citation at 23 (15th ed. 1994) clearly points out that the use of the introductory signal "See" is used when the

> Cited authority clearly supports the proposition. "See" is used instead of "[no signal]" when the proposition is not directly stated by the cited authority but obviously follows from it; there is an inferential step between the authority cited and the proposition it supports.

(continued...)

> Civil Rights Act of 1964 (race, color, sex, national origin, and religion); the Americans with Disabilities Act (disability); the National Labor Relations Act (union activities); the Equal Pay Act (sex).
>
> ...
>
> It would not accord with this scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act.

The fact that this Court listed the ADA amongst those enacted as part of the "wider statutory scheme to protect employees" is an excellent indication that the lesser known Vocational Rehabilitation Act is also part of that scheme. The basic thrust of the Vocational Rehabilitation Act is identical to that of the ADA. The Ninth Circuit so recognized it in its decision below. (Id. at p. 4).

It is patently clear that the Ninth Circuit correctly premised its decision below on the explicit and unanimous holding in McKennon. The Petitioner's attempt to distinguish the ADEA[2]

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[1](...continued)
(emphasis in original). The Petitioner, through its writ, has failed to make the "inferential step" that this Court has explicitly says is warranted as set forth in McKennon, 115 S.Ct. at 884.

[2] It is worth noting that the Petitioner's argument (p. 7) that "McKennon is distinguishable from the instant case because it dealt with ADEA legislation" is somewhat disingenuous because later in its petition (p. 10), the Petitioner states that

> [t]he [Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq. (herein, "ADA"),] explicitly adopted much (sic) of the provisions of the Rehabilitation Act,

(continued...)

from the Rehabilitation Act, so as to avoid liability in the instant case, is directly contrary to this Court's statement in McKennon, 115 S.Ct. at 885, that an "employer could have been motivated by knowledge it did not have and cannot now claim that the employee was fired for the nondiscriminatory reason."

2. This Court, Just One Year Ago, Unanimously Adopted the Same Rationale Later Set Forth in the Ninth Circuit's Decision.

Just one year ago this Court, in McKennon, 115 S.Ct. at 882, answered the question of

> whether an employee discharged in violation of the Age Discrimination in Employment Act of 1967 is barred from all relief when, after her discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful and legitimate grounds.

To come back just one short year later, essentially substitute the words "the Rehabilitation Act of 1973" for "the Age Discrimination in Employment Act of 1967," and then ask the same question again certainly does not appear to warrant asking this

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[2](...continued)

> particularly those guidelines and definitions that concerned employment discrimination. The language of the ADA is instructive in understanding the limitations on the rights offered under both the Acts (sic).

(citing Statement by President George Bush upon signing S. 933 (July 26, 1990), reprinted in 1990 U.S.C.C.A.N. 601). The Petitioner fails to mention, however, that in McKennon, 115 S.Ct. at 884, this Court, in support of its decision that the Petitioner contends is inapplicable to this case, explicitly found that the ADA was "part of a wider statutory scheme to protect employees in the workplace nationwide."

Court to grant certiorari in the instant case. This is especially true given the fact that the McKennon decision was unanimous.

Furthermore, the Petitioner has failed to note that the Ninth Circuit's decision in Junot is not in direct conflict with any other U.S. Court of Appeals decision.

3. The Question Presented In this Case is not Important Enough to Warrant Review.

Aside from the previously mentioned problems associated with this Court's granting certiorari in the instant case, it is also true that the question presented in this case, while of the utmost importance to the respective parties, is, in the context of the national legal scheme, not of such importance to warrant review. In its petition (p. 18), the Petitioner authors a list of horribles that will beset employers who hire handicapped employees under the Ninth Circuit's Junot decision. What the Petitioner fails to mention is that this list of horribles is merely prophetic and that the Ninth Circuit's decision in Junot "may not be cited to or by the courts of [the Ninth] Circuit except as provided by 9th Cir. R. 36-3." Junot at 1 n.*.

Furthermore, the factors of the Ninth Circuit decision below turns upon its own facts; consequently, it will affect few others than the litigants. In its petition (p. 21) the Petitioner itself submits that the Ninth Circuit's

> procedure, so offensive to notions of due process, is especially troubling in light of the fact that the County does not merely have some evidence that could be used to confront Junot during cross-examination on this

> point, the County has overwhelming evidence, i.e., Junot's sworn testimony in her divorce trial that she was unable to work because of an unusable right arm; Junot's four sworn divorce court petitions for orders to show cause wherein she consistently claimed to be unable to work, inter alia, because of her right arm; psychiatric hospital records relating to Junot's attempted suicide and her statements to the nursing staff during her stay there; and her medical records relating to her many absences from work due to a long history of debilitating migraine headaches. In other words, not only could the County rebut Junot's claim that she was "otherwise qualified," the County could also impeach Junot through cross-examination. The Ninth Circuit's decision, however, has denied the County that opportunity.

(emphasis in original). Thus, the Petitioner, in its petition, has aptly illustrated that the very uniqueness of the facts of this case precludes review by this Court.[3]

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

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[3] By no means does the Respondent necessarily accept as true either the Appellant's accounting of these self-proclaimed facts or their applicability to the instant case. Rather, the Respondent merely wishes to show that even the Appellant would have to agree (and implicitly has agreed) that the facts in Junot are quite unique. Obviously, the Ninth Circuit disagreed with Petitioner's overstated argument.

Respectfully submitted this _____ day of February, 1996.

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CERTIFICATE OF SERVICE

Original and 10 copies of Respondent's Response Brief mailed this 16th day of February, 1996, to:

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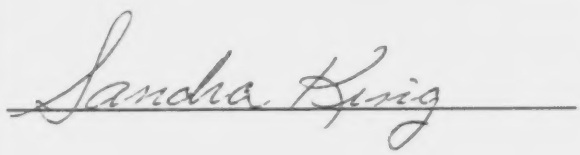
Three copies of the foregoing Respondent's Brief in Opposition to Certiorari mailed this 16th day of February, 1996, to:

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